BEFORE THE
ILLINOIS COMMERCE COMMISSION

In the Matter of	)	
	)	
Petition for Arbitration of XO ILLINOIS,	)	
INC. Of an Amendment to an	)	Docket No. 04-0371
Interconnection Agreement with SBC	)	
ILLINOIS, INC. Pursuant to Section	)	
252(b) of the Communications Act of	)	
1934, as Amended	)	

SBC ILLINOIS' BRIEF ON EXCEPTIONS

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SBC ILLINOIS' BRIEF ON EXCEPTIONS

Illinois Bell Telephone Company, d/b/a SBC Illinois ("SBC Illinois"), by its attorneys, hereby submits its brief on exceptions to the Administrative Law Judge's Proposed Arbitration Decision ("Proposed Order" or "P.O.").[1] As explained further below, SBC Illinois takes exception to a limited number of the Proposed Order's recommended findings. Some of those findings implicate multiple arbitration issues and contract language provisions, and thus a number of SBC Illinois' exceptions below are grouped by topic. SBC Illinois' proposed modifications to the language of the Proposed Order are attached hereto as Attachment 1.

I. Exception No. 1: The Commission Cannot Lawfully Ignore The Current State Of Federal Law (Issues SBC-2, SBC-5, and SBC-7).

The Commission should clarify the Proposed Order's conclusions regarding mass market switching, high-capacity loops (which includes DS1, DS3, and dark fiber loops), and dedicated transport (which includes DS1, DS3, and dark fiber dedicated transport). In Issue SBC-2, the Proposed Order rejects SBC Illinois' proposed "declassification" language insofar as it would apply to *future* UNE declassifications (concluding that such declassifications should be handled through the existing change of law process), and concludes that such language is not necessary "[t]o the extent that the *TRO* has determined that specific network elements no longer need to be unbundled," because "[t]he FCC has already identified them" and "[t]hey can be incorporated by simply listing them in the parties' amendment as elements that will not be unbundled." P.O. at 51. However, the Proposed Order does not, in this conclusion, expressly address the other UNE declassifications at issue here – mass market switching, high-capacity loops, and dedicated transport.

[1] While SBC Illinois contends that this entire arbitration cannot properly be conducted under section 252(b) of the 1996 Act, as explained in SBC Illinois' Motion to Dismiss, SBC Illinois will not repeat those arguments here. Without waiving any of those arguments, this brief is premised on the (incorrect) assumption that this proceeding is properly being conducted under section 252(b) of the 1996 Act.

As the Proposed Order correctly notes with respect to Issues SBC-5 and SBC-7, *USTA II* vacated the rules adopted in the *TRO* requiring unbundled access to mass market switching and dedicated transport, and thus "there are not currently effective FCC rules requiring that dark fiber transport be unbundled" (P.O. at 66) or that mass market switching be unbundled (*id.* at 76).[2] The Proposed Order also states that because the *TRO* rules with respect to these elements were vacated, those rules should not be incorporated into the parties' existing agreement. *See id.* at 66, 76. While these statements are correct as far as they go, the Proposed Order should be clarified to avoid any suggestion that the parties must continue to adhere to the *existing* contract provisions that require unbundled access to switching (including mass market switching) and dedicated transport based on the pre-*TRO* FCC rules held unlawful by *USTA I*. That result would be unlawful, and the Commission should clarify that the parties' contract amendment must account for the current state of the law – *i.e.*, the agreement must reflect that there is currently no unbundling requirement with respect to mass market switching, high-capacity loops, and dedicated transport.

The Supreme Court and the FCC itself have made clear that section 251(c)(3) itself does not require an ILEC to unbundle particular network elements. Rather, the FCC must first determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391-92 (1999) (Congress required the FCC to "determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements"). In the FCC's words, "section 251(c)(3) does not itself

[2] The Proposed Order mistakenly states that *USTA II* did not vacate the FCC's high-capacity loop rules. P.O. at 57 n.39. As explained below, *USTA II* vacated those rules, along with the FCC's mass market switching and dedicated transport rules.

create 'some underlying duty' to 'provide all network elements for which it is technically feasible to provide access.' Instead, it is section 251(d)(2) that directs the [FCC] to issue legislative rules imposing unbundling obligations on incumbent LECs." *Supplemental Order Clarification*, ¶ 15 n.50. Here, there are no rules requiring SBC Illinois to provide unbundled access to high-capacity loops, dedicated transport, or mass market switching, and thus SBC Illinois is not currently required to unbundle those network elements.

It is well-settled that a federal court reviewing a state commission decision under the 1996 Act, such as the Commission decision that will conclude this arbitration, must "apply all valid, implementing FCC regulations now in effect [at the time of review] . . . to the disputed interconnection agreements," regardless of what regulations were previously in effect. *US West Comms. v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002). *See also id.* at 956 ("we conclude that we must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreements"); *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1130 n.14 (9th Cir. 2003) ("all valid implementing regulations in effect at the time that we review district court and state regulatory commission decisions, including regulations and rules that took effect after the local regulatory commission rendered its decision, are applicable to our review of interconnection agreements"); *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 388 (7th Cir. 2004) (same). Just like a reviewing court, the Commission must apply the law in effect at the time of its decision – which in this case includes *USTA II*. In other words, the Commission cannot, at the end of this proceeding, approve an interconnection agreement that does not "comply with *current* FCC regulations." *US West*, 304 F.3d at 956 (emphasis added). Thus, the Proposed Order should be modified to make it clear that the parties' interconnection agreement should not continue to

implement pre-*TRO* FCC regulations that have been held unlawful and no longer exist, rather than comply with current law.

Similarly, Section 252(e)(2)(B) of the 1996 Act provides that a state commission reviewing an arbitrated agreement for approval must ensure that the agreement "meet[s] the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." 47 U.S.C. § 252(e)(2)(B). Thus, at the end of this process, the Commission should not approve an agreement that implements *vacated* FCC regulations, rather than current FCC regulations, and the Proposed Order should be clarified to make it clear that that is not the result in this case. Again, such a result would be contrary to the Act.

Moreover, the contract modifications making clear that mass market switching, dedicated transport, and high-capacity loops are not currently required to be unbundled are necessary in order to implement the *TRO*. While *USTA II* vacated the FCC's rules requiring unbundled access to mass market switching, dedicated transport, and high-capacity loops, the Proposed Order is incorrect when it suggests that "nothing remains, under federal law, for incorporation" with regard to these network elements. P.O. at 66. In particular, paragraph 838 of the *TRO* remains. In that paragraph, one of the ordering clauses of the *TRO*, the FCC ordered that its *UNE Remand Order* – the source of the unbundling obligations reflected in the parties' current agreement – is "terminated." In other words, the *UNE Remand Order* unbundling obligations (including its switching, dark fiber, and dedicated transport unbundling obligations) no longer exist. This change must be implemented in the parties' contract.

In sum, the Commission should modify the Proposed Order to make it clear that the parties must incorporate contract language establishing that SBC Illinois is not currently required to provide unbundled access to dedicated transport, high-capacity loops, or mass market

switching. That could be accomplished in either of two ways. First, the Commission could adopt SBC Illinois' proposed lawful UNE and declassification language (even if it rejects such language to the extent it would apply to *future* UNE declassifications not yet made apparent by regulatory or judicial action).[3] That language expressly provides that, pursuant to *USTA II*, dedicated transport, high-capacity loops, and mass market switching are declassified. SBC Ill. Section 1.3.1.2. Alternatively, should the Commission reject SBC Illinois' proposed declassification language, the Commission could require the parties to adopt contract language simply stating that SBC Illinois is not currently obligated to provide unbundled access to mass market switching, high-capacity loops, or dedicated transport.[4]

II. Exception No. 2: The Commission Has No Authority In This Arbitration To Implement Any Requirement Of Section 271 Of The 1996 Act (Issues SBC-1, SBC-4, SBC-7, SBC-8, SBC-9, SBC-10, SBC-14).

The Proposed Order adopts XO's proposal to include contract language requiring SBC Illinois to provide declassified network elements pursuant to section 271 of the 1996 Act

[3] By "future," SBC Illinois presumes that the Proposed Order means elements declassified under subparagraph (e) of the following contract provision proposed by SBC Illinois:

> **1.3.1** **Without limitation, a network element, including a network element referred to as a Lawful UNE under this Amended Agreement, is Declassified, upon or by** (a) the issuance of the mandate in *United States Telecom Association* v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"); or (b) operation of the *Triennial Review Order* released by the FCC on August 21, 2003 in CC Docket Nos. 01-338, 96-98 and 98-147 (the "Triennial Review Order" or "TRO"), which became effective as of October 2, 2003, including rules promulgated thereby; or (c) the issuance of a legally effective finding by a court or regulatory agency acting within its lawful authority that requesting Telecommunications Carriers are not impaired without access to a particular network element on an unbundled basis; or (d) the issuance of the mandate in the D.C. Circuit Court of Appeals' decision, *United States Telecom Association* v. FCC, Case No. 00-1012 (D.C. Cir. 2004) ("USTA II"); **or (e) the issuance of any valid law, order or rule by the Congress, FCC or a judicial body stating that SBC Illinois is not required, or is no longer required, to provide a network element on an unbundled basis pursuant to Section 251(c)(3) of the Act.**

[4] XO will undoubtedly argue that state law requires SBC Illinois to continue to provide access to unbundled mass market switching, high-capacity loops, and dedicated transport regardless of the state of federal law. As SBC Illinois explained in its reply brief (at 34-35), that is wrong. Except in the narrow case of the existing end-to-end platform (which the Commission is currently reconsidering in Docket No. 01-0614), the Commission has not imposed any unbundling obligations with respect to mass market switching, high-capacity loops, dedicated transport, or other UNEs that are independent of federal law. And to the extent the Commission continues to interpret section 13-801 to require SBC Illinois to provision an end-to-end platform where the FCC's rules contain no such requirement, or where the FCC has held that a network component of such a platform does not satisfy the impairment requirement of 1996 Act, that would be inconsistent with federal law.

(although not at TELRIC rates). *See, e.g.*, P.O. at 45. That proposal is unlawful, because the Commission has no jurisdiction or authority to arbitrate any issues related to the provision of network elements pursuant to section 271.

The Proposed Order states that "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis." P.O. at 45. *See also id.* at 76 ("we agree with XO that the amended ICA should recognize any unbundling obligation imposed by Section 271 of the Federal Act," because "the TRO declares that Section 271 creates an unbundling requirement that is distinct from the Section 251 requirement"). Even if that is accurate, that is not the issue here. Rather, the issue here is the Commission's jurisdiction and authority over section 271 requirements in this arbitration. The Commission has no such jurisdiction or authority, and thus cannot require the parties to include in the contract language governing access to section 271 network elements. Nor can it require SBC Illinois to adhere to particular performance standards in the provision of any section 271 network elements, as the Proposed Order proposes with respect to Issue SBC-14.

The Proposed Order does not (and cannot) identify any basis for asserting authority regarding SBC Illinois' compliance with the requirements of section 271. Instead, it observes that "SBC has apparently not petitioned the FCC, pursuant to Section 253(d) of the Federal Act, to preempt our authority over Section 271 UNEs." P.O. at 61. That is beside the point (even if the Proposed Order's characterization of section 253(d) were correct).[5] There is no need for SBC Illinois to petition the FCC to "preempt" authority that the Commission does not have in the

[5] Section 253(d) is simply inapplicable here. That section provides for FCC preemption by declaratory ruling of any State or local government statute or requirement that "violates subsection (a) or (b)" of section 253. 47 U.S.C. § 253(d). That provision has nothing to do with section 271 or section 251 or state commissions exercising delegated arbitration authority under section 252.

first place. For instance, SBC Illinois has not petitioned any federal (or state) agency or court to declare that the Commission is "preempted" from purporting to implement federal environmental laws. That does not mean the Commission currently has such authority, even if, like section 271, federal environmental laws might create an "obligation to which SBC must adhere." *See id.* at 45.

Here, not only has the Proposed Order failed to identify the basis upon which it purports to assert authority to enforce section 271, but it is clear that there is no such authority. Looking at the terms of the Act itself, it is clear that section 271 confers no authority upon the Commission. Rather, section 271 makes clear that the FCC, and *only* the FCC, has authority under section 271 to enforce that provision. First, section 271 is clear that only the FCC is responsible for approving section 271 applications in the first instance. A BOC may provide interLATA services originating from in-region states only after submitting an application *to the FCC* (47 U.S.C. § 271(d)(1)) and only after approval of the application is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). And as the Seventh Circuit has already held, a state commission may not "parley its limited role in issuing a recommendation under section 271" to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004).

Once an application is approved, section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received

approval to provide interLATA services. The plain terms of the statute thus make clear that states have no role in enforcing any requirements of section 271.

That the ALJ has already ruled that this is an arbitration under section 252 of the Act does not alter the analysis. The scope of a state commission's authority in conducting an arbitration is governed by section 252 of the Act. That section confers upon the states the power to conduct arbitrations to resolve issues only concerning the obligations of section 251, not section 271. Section 251(c)(1) sets forth the issues that an ILEC must negotiate, and thus could potentially become subject to arbitration. By the plain terms of section 251(c)(1), the scope of such issues is limited to "the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection." Section 271 is not mentioned – nor, for that matter, is section 271 mentioned *anywhere* in sections 251 or 252.

Similarly, section 252(a)(1) provides for the negotiation of voluntary agreements "[u]pon receiving a request for interconnection services, or network elements pursuant to section 251." Again, section 271 does not come into play. And a state commission's arbitration power is limited to instances where an ILEC "receives a request for negotiation under [section 252]." 47 U.S.C. § 252(b)(1).

Section 252 also sets forth the standards for states to follow in conducting arbitrations. Specifically, section 252(c)(1) directs the state to "ensure that resolution and conditions meet *the requirements of section 251*, including the regulations prescribed by the [FCC] pursuant to section 251." In addition, section 252(e)(2) provides that a state commission may reject an agreement adopted by arbitration "if it finds that the agreement does not meet *the requirements of section 251*, including the regulations prescribed by the [FCC] *pursuant to section 251*, or the standards set forth in [section 252(d)]." In contrast, nowhere does the Act direct state

commissions to arbitrate disputes concerning, or approve interconnection agreement containing, obligations other than those set forth in section 251. The Act is clear that the states only have authority under section 252 to arbitrate issues arising under section 251. And issues concerning section 271 do not arise under section 251 any more than, say, issues concerning the possible sale of SBC's headquarters building.

Finally, the FCC held that section 271 checklist items are not governed by section 251 of the 1996 Act, but instead are governed by "the standards set forth in sections 201 and 202" of the 1934 Communications Act. *TRO*, ¶ 656. *See also id.*, ¶ 662 ("'If a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with sections 201(b) and 202(a).'"). Those sections do not provide jurisdiction to state commissions, but instead grant the *FCC* certain powers and jurisdiction. Thus, the FCC held, "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the Commission [i.e., the FCC] will undertake* in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *Id.*, ¶ 664.

In sum, the Commission has no authority to enforce any requirements of section 271 in this arbitration, whether by adopting XO's proposed language regarding section 271 or by dictating the performance measures that will apply to any provision of section 271 network elements.

III. Exception No. 3: SBC Illinois Is Not Currently Required To Provide EELs (Issue SBC-5).

The Proposed Order concludes (at 66) that SBC-1 must continue to provide access to EELs (although not necessarily at TELRIC prices) because *USTA II* did not overturn "the TRO

provisions pertaining to access to EELs." P.O. at 66. That proposed conclusion is contrary to federal law.

FCC Rule 5 (47 C.F.R. § 51.5) defines an "EEL" as "a combination of an unbundled loop and unbundled dedicated transport." In other words, an EEL is a particular kind of combination of *unbundled* network elements. To the extent a type of loop or dedicated transport is no longer a UNE, then an ILEC is no longer required to provide access to that network element as part of an EEL. In other words, because an EEL by definition is "a combination of an *unbundled* loop and *unbundled* dedicated transport," then by definition an EEL cannot consist of, and a CLEC has no right to demand access as an "EEL" to, combinations of things other than an unbundled loop and unbundled dedicated transport.

For instance, a CLEC has no right to demand access to a supposed "EEL" consisting of an OCn loop and/or OCn dedicated transport, because neither OCn loops nor OCn dedicated transport are *unbundled* network elements. Similarly, under current federal law a CLEC has no right to access a supposed "EEL" consisting of DS1, DS3, or dark fiber loops and/or transport, because there are currently no federal rules requiring access to those facilities as an "unbundled loop" or "unbundled dedicated transport."

The Proposed Order (at 66) asserts that "[a]ccess to EELs is accorded separate treatment and analysis in the *TRO* and *USTA II*, apart from the treatment and analysis accorded access to dedicated transport." That is not entirely accurate. In particular, the *TRO* does not contain any impairment or unbundling analysis of EELs. That is because, as explained above, an EEL is merely one type of combination of *unbundled* network elements, and thus is entirely dependent and conditioned upon the FCC's impairment and unbundling analysis of the component elements – loops and dedicated transport. For the same reason, the *TRO* does not contain any separate

impairment or unbundling analysis of any other combination of UNEs, such as the UNE-P. Again, that is because the availability of any UNE combination is entirely dependent upon the availability of its constituent components as UNEs. The FCC's combinations rule (47 C.F.R. § 51.315), like its specific definition of an EEL, makes this clear. That rule provides that ILECs must "perform the functions necessary to combine *unbundled* network elements."

The *TRO's* specific discussion of EELs (which analyzed the propriety of *additional* limitations on the availability of EELs, i.e., the service eligibility criteria, above and beyond the unbundling and impairment analysis of the underlying loop and dedicated transport components) also make this clear. Section VII.A.2.b ("EELs") of the *TRO* begins:

> As noted above, our rules currently require incumbent LECs to make UNE combinations, including loop-transport combinations [i.e., an EEL], available in all areas *were the underlying UNEs are available*. . . . We *decline* to designate EELs as additional UNEs for which an impairment analysis is necessary. Instead, we continue to view EELs as *UNE* combinations consisting of *unbundled* loops and *unbundled* transport . . . . *TRO*, ¶ 575 (emphases added).

In other words, there is no separate EEL unbundling requirement; EELs are required only as a consequence of the FCC's combinations rule, and are required only where the component network elements are *unbundled* network elements. The FCC made this crystal clear in the same paragraph of the *TRO*:

> Thus, *to the extent DS1 transport facilities are available along a specific route*, for example, the incumbent LEC must provide (upon request) a DS1 EEL consisting of unbundled loop and unbundled transport facilities. . . . Similarly, if desired, a competitive LEC could obtain access to a DS0 EEL *so long as the underlying UNEs are available pursuant to our impairment analysis*. *TRO*, ¶ 575 (emphases added).

Contrary to the Proposed Order's suggestion, it is not, and never was, SBC Illinois' position "that the *TRO* provisions pertaining to access to EELs . . . were overturned by *USTA II*."

P.O. at 66. Rather, it is those *TRO* provisions themselves – which were not overturned – that make clear that SBC Illinois is not currently required to provide access to DS1, DS3, or dark fiber EELs. The FCC's currently effective EEL rules provides that an ILEC is required to provide an EEL only if the underlying loop and transport components are required to be unbundled – that is, "so long as the underlying UNEs are available pursuant to our impairment analysis." *TRO*, ¶ 575. Because the D.C. Circuit vacated the FCC's DS1, DS3, and dark fiber rules, those elements are no longer "available pursuant to [the FCC's] impairment analysis" (*id*), and thus EELs composed of those network elements are no longer available.

IV. Exception No. 4: USTA II Vacated The FCC's High-Capacity Loops Rules (Issue SBC-3).

The Proposed Order states that it "does not agree with SBC's assessment of the impact of *USTA II* on the FCC's unbundling of DS3 loops" because "[t]he court did not remand or vacate the FCC's loop access rules." P.O. at 57 n.39. That is wrong.

In its "Conclusion," the D.C. Circuit stated that "[w]e vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations . . . . *So ordered.*" *USTA II*, 359 F.3d at 594-95. The FCC's high-capacity loop rules constitute one of the FCC's subdelegated impairment determinations, and those rules were thus vacated.

While the D.C. Circuit did not separately address the FCC's high-capacity loop rules, that is because the Court lumped the FCC's findings for "DS1, DS3, and dark fiber" together, including both high-capacity loops and dedicated transport, and addressed both under the hybrid moniker "high-capacity dedicated transport." *Id.* at 573. Notwithstanding the D.C. Circuit's reference to dedicated transport, it is apparent that its holding applies equally to high-capacity loops. The D.C. Circuit flatly held that "the Commission may not subdelegate its § 251(d)

authority to state commissions." *Id.* at 574. Thus, the Court held, "[w]e therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme." *Id.* The FCC's "national impairment findings with respect to DS1, DS3, and dark fiber," of course, include both its high-capacity loop and dedicated transport rules. Moreover, the Court included within its discussion of high-capacity facilities "transmission facilities dedicated to a single customer," which is how the FCC defines a "loop." *See* 359 F.3d at 573; 47 C.F.R. § 51.319(a).

Moreover, any suggestion that the FCC's high-capacity loop rules were somehow unaffected by *USTA II* simply makes no sense. The D.C. Circuit held that the FCC may not subdelegate its authority under section 251(d) to state commissions, and expressly vacated such subdelegations. The suggestion that this ruling could somehow apply only to the FCC's trigger and potential deployment rules for mass market switching and dedicated transport, but not its identically-structured trigger and potential deployment rules for high-capacity loops, defies common sense. The FCC made clear that its high-capacity loop rules "delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled high-capacity loops" (*TRO*, ¶ 328), just as its dedicated transport rules "delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled transport" (*id.*, ¶ 394), and just as its mass market switching rules "delegate[] a role to state commissions in identifying impairment for unbundled circuit switching" (*id.*, ¶ 534).

Finally, the Commission's actions in other proceedings demonstrate that it clearly understands that the FCC's high-capacity loop rules were vacated by *USTA II*. The Commission has effectively suspended its nine-month high-capacity loop and dedicated transport proceeding (Docket No. 03-0396) well beyond the FCC's nine-month deadline (which lapsed on July 2,

2004), and no CLEC has since petitioned the Commission to resume or complete that proceeding. The Proposed Order's recommended conclusion here is squarely at odds with the Commission's own actions in Docket No. 03-0396.

V. Exception No. 5: XO's Proposed Language Defining Routine Network Modifications Should Be Rejected, And The Commission Should Not Prejudge Future Routine Network Modification Issues That Are Not Currently Before The Commission (Issue XO-1).

The Proposed Order recommends adoption of XO's proposed language defining routine network modifications to include certain tasks regarding cross-connects and DS1 loop terminations to a NID. P.O. at 10-11. The Commission should reject XO's proposed language. SBC Illinois does not necessarily disagree with the Proposed Order's statement that "the distinguishing characteristic of a routine network modification is whether the ILEC performs it for its own customers, not whether it is expressly mentioned in the *TRO*." P.O. at 11. But SBC Illinois' objection is not simply that the additional tasks XO proposes to list are not expressly mentioned in the *TRO*. Rather, not only are those tasks not mentioned, but XO has not provided any evidence that the tasks in fact satisfy the FCC's definition of a "routine network modification." And in the absence of any such evidence upon which to reasonably conclude that the tasks in issue satisfy that definition, it would be arbitrary and capricious to include XO's proposed language in the contract amendment.

With respect to any future dispute regarding cost recovery for routine network modifications, the Proposed Order (at 10) states that "[i]n any subsequent proceeding before this Commission, SBC shall bear the burden of proving that a cost is not so recovered" in its existing rates. That statement should be omitted from the Commission's order in this arbitration. In any future proceeding, the burden of proof should be determined by whatever ordinary burden of proof rules or standards govern in that proceeding. It may or may not be the case that SBC

Illinois would bear the burden of proof in the type of proceeding described by the Proposed Order, and it would be inappropriate to pre-judge the issue in the absence of a live evidentiary controversy. Moreover, the burden of proof in future proceedings involving routine network modification cost recovery is not an "open issue" (47 U.S.C. § 252(c)) that the parties have presented to the Commission for arbitration, and thus there is no basis for the Commission to address the issue.

VI. Exception No. 6: The BFR Process Is Appropriate With Respect To Commingling Orders (Issue XO-2).

The Proposed Order concludes that it would be unreasonable to use the BFR process "as a standardized mechanism for requesting commingling." P.O. at 17. But SBC Illinois does not propose to use the BFR process as the "standardized mechanism." Rather, SBC Illinois proposes to use the BFR process only where standardized ordering processes (which SBC Illinois is already in the process of developing) are not already in place. As standardized processes are developed, SBC Illinois proposes to use those processes. Moreover, XO has not disputed SBC Illinois' explanation that there are an untold number of possible commingling arrangements that a CLEC might order. *See* SBC Op. Br. at 11-12. Inevitably some CLEC will attempt to order a type of commingling arrangement which SBC Illinois' existing standardized processes are not designed to handle. In such circumstances, the parties' contract should specify the ordering process to be used – the BFR process.

VII. Exception No. 7: XO's Proposal To Deny SBC Illinois Cost Recovery Of Any Costs It Incurs In Performing Commingling Is Contrary To Federal Law (Issue XO-2).

The Proposed Order also recommends adoption of XO's proposal that SBC Illinois be required to perform commingling for free, and recommends rejection of SBC Illinois' proposed language to apply its current time and material charges as applicable. That would be contrary to federal law.

The Proposed Order states that "SBC's proposed commingling charge in unsupported by discussion – much less, approval – in the TRO." P.O. at 17. But that is irrelevant. The FCC did not say anything one way or the other about nonrecurring charges for commingling. In the face of that silence, the pre-existing pricing requirements of the Act and the FCC's TELRIC rules apply – and those requirements provide that an ILEC must be allowed to recover its costs of providing UNEs. In the same vein, the *TRO* promulgates a rule requiring ILECs to provide unbundled access to mass market (DS0) loops. But it says nothing about the charges for such loops. Under the Proposed Order's reasoning, SBC Illinois would apparently now be free to charge whatever it wishes for loops. That clearly would be an unreasonable interpretation of the FCC's silence.

The Proposed Order also states that SBC Illinois has not "otherwise established the justification (whether practical or legal) for such a change." That is inaccurate. The legal justification includes section 252(d)(1) of the Act, which requires UNE prices to be based on the cost of providing the UNE. That means, to the extent SBC Illinois incurs costs to perform commingling for XO at XO's demand, as a matter of federal law XO must compensate SBC Illinois – it is not entitled to demand that SBC Illinois perform the work for free. The legal justification also includes the FCC's TELRIC pricing rules (including its non-recurring cost rules), which incorporate the same requirement. The "practical" justification is the same: to the extent SBC Illinois incurs costs to perform commingling functions at XO's demand, XO should compensate SBC Illinois for its costs.

The Proposed Order appears to labor under the misapprehension that SBC Illinois is proposing to charge some kind of "discrete commingling charge" upon XO simply for the right to commingle. That is not the case. Establishing a commingling arrangement may or may not

involve actual physical work by SBC Illinois. In instances where XO itself performs the necessary commingling activities, SBC Illinois does not propose to assess any non-recurring charge. It is only in instances where XO asks SBC Illinois to perform the necessary activities on XO's behalf that SBC Illinois proposes to charge "a reasonable fee for any Commingling *work done by SBC-Illinois*." SBC Ill. Section 3.14.1.3.2.[6]

Thus, contrary to the Proposed Order's suggestion, SBC Illinois *does* propose to treat commingling activities in the same manner as "the practical tasks associated with linking, say, two Section 251 UNEs." P.O. at 17. When SBC Illinois performs work to combine UNEs at a CLEC's request, it assesses non-recurring charges to recover its costs of performing those activities. For instance, in its recent Order in Docket No. 02-0864, the Commission approved a non-recurring charges for ordering an existing UNE-P combination, and a different *higher* non-recurring charge for ordering a new UNE-P combination – because providing the latter requires SBC Illinois to perform additional physical work, and, as the Commission clearly recognized, SBC Illinois is entitled under federal law to recover the costs of performing that work.

For all these reasons, the Commission should reject XO's proposal to deny SBC Illinois cost recovery for any commingling work it performs at XO's demand, and should approve SBC Illinois' proposed language.

VIII. Exception No. 8: SBC Illinois Is Not Required To Perform Conversions, And If It Were, The Change Management Process Is The Appropriate Process To Develop New Conversion Ordering Processes (Issue XO-4).

The Proposed Order (at 22) concludes that *USTA II* did not affect the *TRO*'s conversion requirements. That conclusion is erroneous. In *USTA II*, ILECs appealed the FCC's "decision to allow 'conversions' of special access purchases to UNEs." 359 F.3d at 593. The D.C. Circuit

[6] Moreover, SBC Illinois' proposed language provides that the "fee shall be calculated using the Time and Material charges" that are *already* contained in the parties' pricing appendix. SBC Ill. Section 3.14.1.3.2.

agreed with the ILECs that "the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access . . . *precludes* a finding that the CLECs are 'impaired' by a lack of access to the element under § 251(c)(3)." *Id.* (emphasis added). And where a finding of impairment is precluded, of course, a CLEC is not entitled to unbundled access to UNEs. Thus, for instance, "CLECs hitherto relying on special access might be barred from access to EELs [enhanced extended link] as unbundled elements." *Id.* In other words, the very fact that there exists a wholesale arrangement that might be converted to UNEs demonstrates that the CLEC is not impaired without access to, and thus cannot access, UNEs.

Further, if the Proposed Order were correct that SBC Illinois is still required to perform conversions, then the Proposed Order inappropriately rejects use of the Commission-approved change management process for developing conversion ordering processes, and instead directs the parties to include a "clear conversion ordering process" that is "immediately available once the arbitrated amendment is approved and in effect." P.O. at 23. That proposal should be modified. If the change management process is not used, then SBC Illinois may be put into the position of developing different ordering processes for different CLECs – an extremely inefficient and expensive proposition.

Moreover, the Proposed Order overlooks the fact that SBC Illinois' proposed contract language calls for use of the change management process *only* "[w]here processes for the conversion requested . . . are not already in place." SBC Ill. Section 3.15.4. Where processes are already in place, those processes should be used. And there is no need for the contract to specify those pre-existing processes in detail. SBC Illinois, through its account managers, CLEC Handbook, other available documentation, and CLEC website, already provides CLECs great detail regarding its OSS and ordering processes, and those details customarily are not included in

interconnection agreements. Nor should they be, given that OSS procedures and documentation are subject to periodic modification and improvement.

IX. Exception No. 9: If SBC Illinois Is Required To Perform Conversions, Federal Law Entitles It To Cost Recovery (Issue XO-4).

While the Proposed Order correctly concludes that SBC Illinois is entitled to approve the non-recurring charge approved in Docket No. 02-0864 for special access to UNE conversions, it unlawfully concludes that SBC Illinois is not entitled to assess any non-recurring charges for any other conversions. But in Docket No. 02-0864, the Commission ordered that the project administration charge approved in that order be applied to private line to UNE conversions as well as special access to UNE conversions. Order, Docket No. 02-0864, at 214-15.

Moreover, the Proposed Order's conclusion rests upon a fundamental misreading of the *TRO*. *Nowhere* in the *TRO* did the FCC state that ILECs are prohibited from charging cost-based non-recurring charges to recover the costs of any actual work they undertake in processing a conversion. Rather, the only charges that the FCC disapproved of were "wasteful and unnecessary" charges that are *not* cost-based charges intended to recover the actual costs of conversion activities (except certain early termination fees, which the FCC held continue to apply). *TRO*, ¶ 587. And it is only these "wasteful and unnecessary" charges that the FCC also found would be "inconsistent" with nondiscrimination principles. *Id.*

Nowhere did "the FCC knowingly subordinate[] ILEC conversion cost recovery to parity among competitors," as the Proposed Order suggests (at 23). That would contravene the cost-based pricing requirements of section 252(d)(1) of the 1996 Act. And if the FCC had intended to (attempt to) make such a sweeping change to UNE pricing requirements – to "knowingly" deny ILECs cost recovery – surely it would have expressly said so. It did not. In fact, it said nothing about non-recurring charges intended (like SBC Illinois' proposed charges here) to recover

actual costs of actual activities performed on a CLEC's behalf. Instead, it addressed, and disapproved, only "wasteful and unnecessary charges," such as "re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time." *TRO*, ¶ 587. Again, SBC Illinois does not propose to assess any such charges here.

The FCC's implementation of the nondiscriminatory pricing requirement of section 251 of the Act also makes clear that it does not bar cost-based charges (as opposed to non-cost-based, "wasteful and unnecessary" charges). In interpreting the nondiscrimination requirement in the *First Report and Order* (¶ 860), the FCC held: "Section 252(d)(1) . . . *requires* carriers to base interconnection and network element charges on costs. Where costs differ, rate differences that accurately reflect those differences are not discriminatory." (Emphasis added.) It is only "price differences based *not* on cost differences" that are "discriminatory." *Id.* ¶ 861. In the case of conversions, assessing cost-based non-recurring charges on CLECs, even in instances where the ILEC would not have to perform such a conversion for itself if the ILEC were the service provider, is clearly based on a cost difference, and thus is not discriminatory.[7]

X. Exception No. 10: SBC Illinois' Proposed "Lawful UNE" Language Is Appropriate And Necessary To Properly Define The Scope Of SBC Illinois' Unbundling Obligations (Issues SBC-1 and XO-1).

The Proposed Order improperly "rejects SBC's proposal to insert the term 'lawful'" in various sections of the contract amendment on the grounds that that language "is unnecessary, likely to trigger future disputes between the parties, and could be readily abused to delay XO's

[7] Moreover, any suggestion that it would be "discriminatory" to apply cost-based charges for actual work performed on a CLEC's behalf, as opposed to non-cost-based "wasteful and unnecessary" charges that have nothing to do with any work actually performed, would be nonsensical. When SBC Illinois provides retail service to its own retail customers, it bears the entirety of the costs of doing so; CLECs contribute nothing. It would be discriminatory to give CLECs a free ride that SBC Illinois does not have by requiring SBC Illinois to bear part of the cost of service when a CLEC provides retail service. Rather, the CLEC should bear the costs. As the FCC held, "price differences based not on cost differences but on such considerations as competitive relationships" or "other factors not reflecting costs" are "discriminatory" and forbidden by the Act. *First Report and Order*, ¶ 861.

access to SBC services." P.O. at 44. The Proposed Order appears to disregard the language actually proposed by SBC Illinois, and is in error.

SBC Illinois did not propose to simply insert the word "lawful" before UNEs. Rather, it proposed to expressly define the term "Lawful" in the context of UNEs. Definition of capitalized contract terms is an accepted practice employed by all businesses, and enables the contracting parties to understand what a particular word or phrase is intended to mean in their contract. The capitalized, defined term "Lawful," when used in connection with UNEs in the interconnection agreement, is necessary in order to appropriately define the scope of SBC Illinois' obligation to provide UNEs to XO. "Lawful" UNEs are "UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders or lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." SBC Ill. Section 1.1. Network elements that do not satisfy this standard, but were previously provided as UNEs, are considered "declassified." This language appropriately reflects SBC Illinois' obligations to provide UNEs under the *TRO* and the 1996 Act, and thus should be included in the parties' contract.

For instance, the Supreme Court and the FCC itself have made clear that section 251(c)(3) itself does not require an ILEC to unbundle particular network elements. Rather, the FCC must first determine which network elements must be unbundled by applying the "impairment" test of section 251(d)(2). That is, "[s]ection 251(d)(2) does not authorize the [FCC] to create isolated exemptions from some underlying duty to make all network elements available." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 391 (1999). Rather, Congress

required the FCC to "determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Id.* at 391-92. In other words, as the FCC has held, "section 251(c)(3) does not itself create 'some underlying duty' to 'provide all network elements for which it is technically feasible to provide access.' Instead, it is section 251(d)(2) that directs the [FCC] to issue legislative rules imposing unbundling obligations on incumbent LECs." *Supplemental Order Clarification*, ¶ 15 n.50. Thus, the scope of SBC Illinois' UNE obligations is established by effective FCC rules and orders, as SBC Illinois' proposed language provides.

SBC Illinois' proposed contract language also provides that "Lawful UNEs" include those network elements that SBC Illinois is required to unbundle pursuant to "lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with the [1996 Act] or the FCC's regulations to implement the [1996 Act]." SBC Ill. Section 1.1. Again, such language is required by the *TRO* and the 1996 Act. In the *TRO*, the FCC held that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations." *TRO*, ¶ 187. Rather, the FCC held, such actions must be "consistent with the Act" and with "the [FCC's] section 251 implementing regulations" (*TRO*, ¶ 193 & n.614), which is precisely what SBC Illinois' proposed language provides. This language is also directly supported by section 261(c) of the Act ("additional state requirements"), which states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are *necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with* [sections 251-

261 of the Act] *or the [FCC's] regulations to implement* [those sections]." 47 U.S.C. § 261(c) (emphasis added).

The Proposed Order does not quibble with these principles, but suggests that under SBC Illinois' language FCC and ICC orders would "be judged [by] SBC for their consistency with SBC's view of the Federal Act and associated FCC regulations," and "[a]t a logical extreme, nothing in SBC's proposed language would preclude SBC from holding that a conclusion in an administrative or judicial decision affronted the Federal Act, even when that decision expressly held to the contrary." P.O. at 44-45. But while XO certainly attempted to characterize SBC Illinois' language in that manner, that is not what the language actually provides. The Proposed Order appears to have fallen prey to XO's rhetoric. That is, nothing in SBC Illinois' language makes *SBC Illinois* the arbiter of what FCC or ICC orders are "lawful," or "arrogat[es]" power to "SBC to unilaterally adjudge the validity and viability of non-stayed judicial and administrative authorities." *Id.* at 45. Rather, the lawfulness of any requirement is determined by appropriate authorities (*e.g.*, the FCC, the Commission, or a court). In short, SBC Illinois' proposed language already does properly "employ language providing that when SBC is relieved of the obligation to furnish a UNE under federal and state law, its corresponding obligation under the ICA will also be relieved" (P.O. at 45), and thus that language should be adopted.

XI. Exception No. 11: SBC Illinois Cannot Lawfully Be Required To Comply With State Law Requirements If It Has Been Determined That Those Requirements Are Inconsistent With Federal Law (Issues SBC-1, SBC-4, and SBC-7).

With respect to Issue SBC-1 (and other issues), the Proposed Order approves that portion of XO's proposed language stating that SBC Illinois shall provide certain unbundled network elements to the extent required by state law. *See, e.g.*, P.O. at 46. Should the Commission adopt that proposal, it should make clear that that requirement applies only to the extent a state law requirement is not inconsistent with federal law. SBC Illinois does not voluntarily agree to

comply with any state law requirement that has been declared inconsistent with federal law, and it would be unlawful to require SBC Illinois to comply with a state law requirement even if that requirement has been declared invalid by, *e.g.*, a court of competent jurisdiction, the FCC, or the Commission itself.

The Proposed Order's discussion of state law also contains improper dicta. For instance, the Proposed Order states that "the argument that our rulings are inconsistent with Section 261(c) of the Federal Act" is "irrelevant," and that the Commission's judgment that its current rules are consistent with section 261(c) cannot be "collaterally challenged in arbitration." P.O. at 46. But SBC Illinois did not argue in this arbitration that any Commission ruling is inconsistent with Section 261(c) and does not seek to "collaterally challenge" any Commission order here. To the extent the Proposed Order is referring to SBC Illinois' proposed "Lawful UNE" language, that language merely makes clear that state commission orders imposing unbundling requirements must be consistent with section 261(c) – a proposition with which the Proposed Order does not take issue. And, as explained above, nothing in SBC Illinois' proposed language makes SBC Illinois the "unilateral[]" (*id.*) arbiter of what state commission orders are or are not consistent with section 261(c).

XII. Exception No. 12: SBC Illinois' UNE Declassification Language Should Be Adopted (Issue SBC-2).

The Proposed Order inappropriately rejects SBC Illinois' proposed UNE "declassification" language, both as it would apply to the declassifications made by the *TRO* and to future declassifications. *See* P.O. at 51. That recommendation should be rejected.

With respect to declassifications made by the *TRO* (*e.g.*, entrance facilities and OCn loops and transport), the Proposed Order suggests that SBC Illinois' declassification language is unnecessary because "there is no need to establish a process for *identifying* those elements and

incorporating them into the ICA," because "[t]he FCC has already identified them." P.O. at 51. The Proposed Order concludes, therefore, that such elements "can be incorporated by simply listing them in the parties amendment as elements that will not be unbundled (or TELRIC priced)." *Id.* The Proposed Order fails to recognize that SBC Illinois' proposed declassification language (in section 1.3.1.1)[8] does exactly what the Proposed Order espouses, *i.e.*, it *does* expressly "list[]" the *TRO* declassifications "in the parties' amendment as elements that will not be unbundled" (P.O. at 51). XO, on the other hand, proposes no such list or identification. Instead, XO merely proposes some vague "nonconforming facility" language that, unlike SBC Illinois' proposed language, does not expressly identify *any* network element that has been declassified by the *TRO*.

[8] Section 1.3.1.1: By way of example only, and without limitation, network elements that are Declassified include at least the following: (i) any unbundled dedicated transport or dark fiber facility that is no longer encompassed within the definition of unbundled dedicated transport or dark fiber set forth in the FCC's lawful and applicable rules (including, but not limited to entrance facilities and Dedicated Transport at any level other than DS1 and DS3); (ii) DS1 Dedicated Transport, DS3 Dedicated Transport, DS1 Loop, DS3 Loop, or Dark Fiber Transport on a route(s) or in an area as to which it is determined that requesting Telecommunications Carriers are not impaired without access to such elements; (iii) Local Switching for Enterprise Customers (as defined in Section 3.7.3 of this Attachment); (iv) Local Switching for Mass Market Customers (as defined in Section 3.7.2 of this Attachment) in any market in which it is determined that requesting Telecommunications Carriers are not impaired without access to such element; (v) to the extent it constitutes a Lawful UNE, Local Switching subject to the FCC's four-line carve-out rule as described in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3822-31 (1999), per 47 CFR § 51.319(d)(3)(ii); (vi) OCn Loops and OCn Dedicated Transport; (vii) the Feeder portion of the Loop; (viii) Line Sharing; (ix) an EEL that does not meet the Mandatory Eligibility Criteria set forth in Section 3.14.3 of this Attachment; (x) any Call-Related Database, other than the 911 and E911 databases, that is not provisioned in connection with CLEC's use of SBC Illinois 's Lawful ULS for Mass Market Customers (as defined in Section 3.7.2 of this Attachment); (xi) SS7 signaling that is not provisioned in connection with CLEC's use of SBC Illinois 's Lawful UNE Local Switching for Mass Market Customers (as defined in Section 3.7.2 of this Attachment), to the extent Local Switching for Mass Market Customers constitutes a Lawful UNE; (xii) Packet switching, including routers and DSLAMs; (xiii) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over Hybrid Loops (as defined in 47 CFR 51.319 (a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xiv) Fiber-to-the-Home Loops (as defined in 47 CFR 51.319(a)(3)) ("FTTH Loops"), except to the extent that SBC Illinois has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Illinois will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis; or (xv) any element or class of elements as to which a general determination is made that requesting Telecommunications Carriers are not impaired without access to such element or class of elements;

Moreover, as explained above, adoption of SBC Illinois' declassification language is necessary so that the parties' contract amendment reflects the current state of federal law, including the absence of any rules requiring unbundled access to mass market switching, high-capacity loops, and dedicated transport.[9] The declassification of those elements is identified in SBC Illinois' proposed section 1.3.1.2.[10]

For the reasons discussed, at a minimum, the Proposed Order should be amended to approve SBC Illinois sections 1.3.1.1 and 1.3.1.2, as well as section 1.3.1.3, which make it clear that the declassified network elements listed in section 1.3 "shall not constitute lawful UNEs under this Amended Agreement." These provisions do not define the *process* for identifying UNEs that have already been declassified (which the Proposed Order says is unnecessary), but rather identify those network elements that have already been declassified by the *TRO*, as modified by *USTA II*, which, as the Proposed Order correctly concludes, is proper.

XIII. Exception No. 13: SBC Illinois' Proposed Language Regarding Dark Fiber Collocation Should Be Adopted (Issue SBC-5).

The Proposed Order concludes that SBC Illinois' proposed language regarding collocation with respect to dark fiber would "prevent XO from obtaining dark fiber EELs." P.O. at 67. That conclusion is erroneous, because XO would not be entitled to access dark fiber EELs even if dark fiber were currently required to be unbundled. Nowhere in the hundreds of pages of the *TRO* is there any reference to a dark fiber EEL, and XO has not identified any.

Moreover, contrary to the Proposed Order's suggestion, the Commission's ruling in Docket No. 01-0614 does not help XO's case. While the Commission held there that Section 13-

[9] As also explained, even if the Commission does reject SBC Illinois' proposed declassification language, then other contract language clearly providing that unbundled access to mass market switching, high-capacity loops, and dedicated transport would have to be adopted.

[10] Section 1.3.1.2: Pursuant to *USTA II*, at least the following elements are *also* Declassified, as of the issuance of the USTA II mandate: (i) DS1 and DS3 dedicated transport; (ii) DS1 and DS3 loops; (iii) dedicated transport and loop dark fiber; and (iv) Local Switching for Mass Market Customers as defined in Section 3.7.2.

801 does not include a collocation requirement for the termination of EELs, it explicitly did so on the basis of the FCC's definition of dedicated transport, which at the time included entrance facilities. Order, Docket No. 01-0614, ¶ 236. But, as the Proposed Order recognizes, in the *TRO* the FCC re-defined dedicated transport to *exclude* entrance facilities.

Finally, even if the Commission accepts XO's proposal that it be required only to collocate within the LATA to obtain access to a dark fiber EEL (though it should not), the Commission should clarify the statement in the Proposed Order stating that "we conclude that SBC's dark fiber loop collocation requirement should be modified so that collocation at an SBC central office *within the LATA* satisfies the [collocation] requirement." P.O. at 67. Per XO's argument and the Proposed Order's discussion of this issue, if the Commission adopts that argument, collocation within the LATA should be the standard where XO seeks to access a dark fiber *EEL*. Where it seeks access only to a dark fiber *loop*, however, XO should be required to collocate in the central office where that loop terminates, as SBC Illinois' proposed language provides.

XIV. Exception No. 14: SBC Illinois' Proposed Language Regarding Access To Call-Related Databases, Signaling Networks, And AIN Should Be Adopted (Issues SBC-8, SBC-9, and SBC-10).[11]

With respect to Issues SBC-8, SBC-9, and SBC-10, the Proposed Order correctly states that XO has failed to support its proposed language and to identify its dispute. P.O. at 78, 79, 81. However, the Proposed Order's conclusion – that "the Commission will make no ruling with respect to" these issues – should be rejected.[12] Rather, the Commission should adopt SBC

[11] As indicated in SBC Illinois' proposed modifications to the Proposed Order, this exception affects a few additional issues as well.

[12] The Proposed Order makes one exception – its conclusion that "Section 271 obligations should be accounted for." P.O. at 78. That proposal is addressed separately in SBC Illinois' exception addressing section 271.

Illinois' proposed language on these issues. That proposed language is fully consistent – and necessary – to implement the *TRO*, as SBC Illinois explained in its briefs.

Continuing a theme introduced in its opening, the Proposed Order states that these issues were "improperly framed" (*id.* at 78) because the issue topics presented by the parties were "catch-all questions" that are "over-broad" and did not present "proper 'open' or 'unresolved' issues" (*id.* at 3). The Proposed Order suggest that this "reflect[s] the absence of negotiations between the parties." *Id.* at 3. To the contrary, the Proposed Order exhibits a misunderstanding of the negotiation process. The parties to a negotiation do not negotiate issue topics or questions to include in an issues matrix (something not even mentioned, much less required, by the Act) or as headings in the arbitration petition. Rather, they negotiate contract language. Every negotiation is about contract language, and every arbitration too is about contract language – choosing the contract language proposed by one party over the contract language proposed by the other party, so that in the end a complete contract is produced.

While the parties included topic headings in the arbitration petitions and matrices, those headings were and are intended only as a short-hand description of the topic of an issue, for ease of reference. The real "issue presented" – and the issue the parties present for arbitration – is in the contract language. Issue SBC-8, for instance, was called "What terms and conditions should apply to Call related databases, LIDB and CNAM provided in conjunction with UNE-P?" SBC Illinois is not asking the Commission "to consider the general subjects of call-related data bases, LIDB, and CNAM." P.O. at 78. Rather, as in every arbitration, it is asking the Commission to consider and approve its proposed contract language, and to reject XO's competing language. The particular language at issue was identified in bold and underline, thus identifying the particular contract language at issue, and thus the particular contract language disputes.

Moreover, the parties' briefs did not address "general subjects," but addressed the particular contract language disputes between the parties.

In short, the parties presented their competing contract language for arbitration, and briefed their particular disputes regarding that contract language, and thus have presented open issues regarding that contract language for resolution by the Commission in this arbitration. The Commission should not fail in its duty to resolve those disputes (in which case 47 U.S.C. § 252(e)(5) would appear to apply) merely because the headings in the parties' pleadings were not more wordy and specific.

CONCLUSION

For the foregoing reasons and for the reasons explained in SBC Illinois' opening and reply briefs, SBC Illinois urges the Commission to modify the Proposed Order as described above, and to resolve the open issues in favor of SBC Illinois and to direct the parties to include in their Agreement the contract language proposed and endorsed by SBC Illinois.

August 20, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' BRIEF ON EXCEPTIONS** was served on the service list via electronic transmission on August 20, 2004.

_____

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